A

Public Prosecutor v Ooi Teng Chian

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P–05–45 OF 2004

B RICHARD MALANJUM FCJ, HASHIM YUSOFF JCA AND AUGUSTINE PAUL FCJ

16 AUGUST 2005

Criminal Law — Dangerous Drugs Act 1952 s 39B(1)(a) — Trafficking in dangerous drugs — Appeal against conviction and sentence — Charged amended to one of possession

C

Criminal Procedure — Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Convicted on lesser charge of possession — Whether trial judge misdirected himself on admissibility of cautioned statement — Dangerous Drugs Act 1952 s 37A(a)

D

Criminal Procedure — Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Convicted on lesser charge of possession — Whether trial judge misdirected himself on evidence before him — Whether samples analysed by chemist sufficient in law to support her conclusion

E

Criminal Procedure — Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Convicted on lesser charge of possession — Statutory presumption — Whether possible to further presume that accused was trafficking in dangerous drugs on the facts of the case

F

Criminal Procedure — Appeal — Sentence, against — Whether sentence imposed adequate

G

The accused was charged with the offence of trafficking in 149.60g of heroin and 35.77g of monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. At the conclusion of the case for the prosecution, the learned High Court judge amended the charge to one of possession under s 12(2) of the Act and punishable under s 39A(2)(d) of the Act.

H The accused pleaded guilty to the amended charge. Upon his conviction, a sentence of nine years' imprisonment was imposed with effect from the date of his arrest. He was also ordered to be given 10 strokes of the rattan. This appeal was by the prosecution against the conviction and sentence.

I

Held, dismissing the appeal against conviction and allowing the appeal against sentence in part:

(1) Section 37A(2) of the Act reiterates what is contained in the caution. Thus a proper explanation of the caution with emphasis on the right of a person not

to answer any questions as contained therein will ensure that 37A(2) of the Act has been complied with. Such an explanation will ensure that the person is clear in his mind that there is no obligation on him to answer questions so as to affect the voluntariness of the statement. It is therefore unnecessary to read 37A(2) of the Act to a person giving a statement. To that extent, the learned trial judge had been misguided by the authority relied on by him (see para 11).

(2) The test in determining whether the questions asked are offensive is to ascertain whether they have affected the voluntary nature of the statement. The starting point for such an exercise is the manner of establishing the voluntariness of a statement. As a statement obtained pursuant to a cross-examination mode of questioning during its recording will become inadmissible only if its voluntariness has thereby been affected, it follows that the accused must testify on the manner in which the questions operated in his mind so as to cause him to make the statement. His evidence may reveal that the questions were of such a nature that they amounted to an intimidating and threatening form or oppression to compel him to answer them thereby making the statement inadmissible. In the absence of such evidence, it will not be possible to make a ruling on the effect of the questions in order to satisfy the subjective element of voluntariness (see paras 13–14).

(3) In the instant case, the accused did not give any evidence on the effect the questions asked had on him in order to cause him to answer them. Without such evidence, the learned trial judge proceeded to rule that the cross-examination of the accused by the recording officer amounted to probing questions being asked thereby rendering the statement involuntary. This is only the first part of the test that is involved in an objection of this nature. Clearly, the learned trial judge was in error in making the ruling without any consideration of the subjective aspect of the questioning. He had misdirected himself in following *Public Prosecutor v Tay Bee Seng* [1992] MLJU 10 which had not fully explored the law in this area (see para 15).

(4) There is no requirement in law for the caution to be explained as contemplated by the learned trial judge. At the time of recording, the statement the police authorities may not even have decided on the provision of law under which the accused is to be charged, if at all. Therefore, it is not possible to explain the caution to the accused in the terms as propounded by the learned trial judge. What the accused must be made aware of is that he is not obliged to say anything or to answer any question and that anything he says may be used as evidence. The unnecessary extension of the requirements of the caution by the learned trial judge was an error of law. It followed that the grounds upon which the learned trial judge ruled the cautioned statement as being inadmissible cannot be sustained in law. However, the ruling made can be justified on another ground. A perusal of the notes of evidence revealed that there was no evidence of the actual words of the caution read to the accused. The cautioned statement made by the accused was therefore inadmissible as there was no evidence of the actual words of the caution that was administered (see para 16).

(5) Where representative samples are taken from each receptacle, it is for the chemist to determine the sufficiency of the required weight. That was the procedure followed in this case and is the correct course of action adopted as

explained in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489. The samples analysed by the chemist were therefore sufficient in law to support her conclusion (see para 21).

(6) Apart from proof of custody of the dangerous drugs, there was no evidence on record to infer knowledge of them by the accused. The fact that the accused looked frightened was neutral on the facts of this case. It therefore became necessary to invoke the statutory presumption in s 37(d) of the Act to infer the required knowledge on the part of the accused in order to establish that he had possession of the dangerous drugs. It was therefore not possible to further presume that the accused was trafficking in the dangerous drugs as provided in the Act. It followed that the reduction of the charge by the learned High Court judge was sustainable (see para 24).

(7) It is well established that sentencing in drug offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case, the amount of dangerous drugs involved was very substantial. In such circumstances, neither the guilty plea of the accused nor the fact that he was a first offender would be considered too favourably in favour of the accused. Thus, the sentence imposed by the learned trial judge was inadequate. Accordingly, the term of imprisonment was increased to 15 years. The imposition of the 10 strokes of the rattan was retained (see para 25).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana kesalahan mengedar 149.60g heroin dan 35.77g monoacetylmorphines di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum di bawah s 39B(2) Akta tersebut. Di penutup kes pihak pendakwaan, hakim Mahkamah Tinggi yang bijaksana telah meminda pertuduhan itu kepada milikan dadah di bawah s 12(2) Akta tersebut dan boleh dihukum di bawah s 39A(2)(d) Akta tersebut. Tertuduh telah mengaku bersalah kepada pertuduhan pindaan itu. Setelah beliau disabitkan, satu hukuman penjara selama sembilan tahun telah dikenakan bermula dari tarikh tangkapannya. Beliau juga telah diperintahkan untuk dikenakan 10 kali sebatan rotan. Rayuan ini dibuat oleh pihak pendakwaan terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap sebahagian daripada hukuman:

(1) Seksyen 37A(2) Akta tersebut mengulangi apa yang terkandung dalam amaran itu. Oleh itu, satu penjelasan tentang amaran yang betul dengan penekanan ke atas hak seseorang untuk tidak menjawab apa-apa soalan seperti mana yang terkandung dalamnya memastikan bahawa s 37A(2) Akta tersebut dipatuhi. Penjelasan sedemikian akan memastikan bahawa seseorang itu jelas pemikirannya yang beliau tiada apa-apa obligasi ke atasnya untuk menjawab soalan sebagai mempengaruhi kesukarelaan memberi kenyataan itu. Oleh itu tidaklah perlu untuk membaca s 37A(2) Akta tersebut kepada seseorang yang

memberikan kenyataan. Setakat itu, hakim perbicaraan yang arif telah salah arah melalui autoriti yang beliau bergantung pada (lihat perenggan 11).

(2) Ujian untuk menentukan sama ada soalan yang ditanyakan adalah bersifat menindas adalah dengan memastikan sama ada ia telah menjejaskan sifat sukarela memberi kenyataan itu. Titik permulaan untuk ujian sebegini adalah cara membuktikan kesukarelaan memberi suatu kenyataan. Suatu kenyataan diperoleh berikutan satu pemeriksaan balas secara menyoal semasa merekodkannya akan menjadi tidak boleh diterima hanya jika kesukarelaannya terjejas; maka itu, tertuduh hendaklah memberi keterangan tentang cara soalan tersebut diterima dalam pemikirannya sehingga menyebabkan beliau memberikan kenyataan sedemikian. Keterangan beliau boleh menunjukkan bahawa soalan tersebut bersifat berbentuk ugutan atau bersifat menindas yang memaksanya untuk menjawab soalan tersebut dan oleh itu menjadikan kenyataan itu tidak boleh diterima. Dengan ketiadaan keterangan sedemikian, tidaklah mungkin untuk membuat satu keputusan untuk berdasarkan kesan soalan tersebut bagi tujuan memuaskan elemen kesukarelaan yang subjektif (lihat perenggan 13–14).

(3) Dalam kes semasa, tertuduh tidak memberikan apa-apa keterangan tentang kesan soalan tersebut ke atasnya bagi tujuan menyebabkannya menjawab soalan tersebut. Tanpa keterangan sedemikian, hakim perbicaraan yang arif terus memutuskan bahawa pemeriksaan balas terhadap tertuduh oleh pegawai perakam membentuk soalan yang ditanya secara menyiasat yang mengakibatkan kenyataan itu tidak boleh diterima. Ini hanya sebahagian daripada ujian yang terlibat dalam bantahan yang bersifat sebegini. Adalah jelas hakim perbicaraan yang arif terkhilaf dalam membuat keputusan tanpa mempertimbangkan aspek subjektif berhubung soal siasat. Beliau telah tersalah arah dalam mengikut *Public Prosecutor v Tay Bee Seng* [1992] MLJU 10 yang tidak mendalami keseluruhan undang-undang berkaitan bidang ini (lihat perenggan 15).

(4) Tidak terdapat keperluan dari segi undang-undang untuk amaran itu dijelaskan seperti mana yang direnungkan oleh hakim perbicaraan yang arif. Pada masa membuat rekod, kenyataan pihak berkuasa polis mungkin tidak lagi memutuskan peruntukan undang-undang mana tertuduh akan dituduh, jika adapun. Oleh itu, ia tidak mungkin untuk menjelaskan amaran kepada tertuduh dalam terma yang dikemukakan oleh hakim perbicaraan yang arif. Apa yang perlu disedari oleh tertuduh adalah beliau tidak diwajibkan berkata apa-apa atau menjawab apa-apa soalan dan apa-apa yang dikatakan oleh beliau akan digunakan sebagai keterangan. Tambahan keperluan amaran yang tidak perlu oleh hakim perbicaraan yang arif adalah satu kesilapan undang-undang. Justeru itu alasan-alasan yang digunakan oleh hakim perbicaraan yang arif untuk memutuskan kenyataan beramaran itu tidak boleh diterima, tidak boleh disokong oleh undang-undang. Namun, keputusan yang dibuat boleh dijustifikasikan berdasarkan alasan lain. Satu penelitian terhadap nota keterangan menunjukkan bahawa tidak terdapat apa-apa keterangan tentang perkataan-perkataan sebenar berhubung amaran yang dibacakan kepada tertuduh. Kenyataan beramaran yang dibuat oleh tertuduh oleh itu tidak boleh

diterima kerana tidak terdapat apa-apa keterangan bahawa perkataan-perkataan sebenar berhubung amaran telah dibuat (lihat perenggan 16).

(5) Di mana sampel-sampel representatif diambil daripada setiap bekas, ahli kimia itu hendaklah menentukan kecukupan berat yang dikehendaki. Ia adalah prosedur yang diikuti dalam kes ini dan adalah siri tindakan betul yang digunakan seperti yang dijelaskan dalam *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ1 489. Sampel-sampel yang dianalisis oleh ahli kimia oleh itu adalah mencukupi dari segi undang-undang untuk menyokong kesimpulannya (lihat perenggan 21).

(6) Dalam kes ini, selain daripada bukti pemilikan dadah berbahaya, tiada keterangan atas rekod untuk membuat inferens yang tertuduh mengetahui tentangnya. Bahkan hakikat yang tertuduh kelihatan takut adalah neutral berdasarkan fakta kes ini. Ia menjadi perlu untuk menggunakan anggapan statutori dalam s 37(d) Akta tersebut untuk membuat inferens tentang pengetahuan di pihak tertuduh bagi tujuan membuktikan bahawa beliau mempunyai milikan dadah berbahaya. Oleh itu tidaklah mungkin untuk terus beranggapan bahawa tertuduh mengedar dadah seperti yang diperuntukkan dalam Akta tersebut. Justeru itu pengurangan dalam pertuduhan oleh hakim Mahkamah Tinggi yang arif adalah diterima (lihat perenggan 24).

(7) Adalah mantap bahawa hukuman dalam kesalahan dadah hendaklah mendatangkan kebaikan untuk kepentingan awam kerana ia suatu masalah negara yang berterusan. Berat dadah yang terlibat juga merupakan faktor lain yang perlu dipertimbangkan. Dalam kes ini, jumlah dadah berbahaya yang terlibat amat besar. Dalam keadaan sedemikian, pengakuan bersalah tertuduh mahupun hakikat bahawa beliau seorang pesalah untuk kali pertama tidak boleh dianggap sebagai fakta yang boleh menyebelahi tertuduh. Oleh itu hukuman yang dikenakan oleh hakim yang arif adalah tidak memadai. Sewajarnya, tempoh penjara ditambah kepada 15 tahun. Hukuman 10 sebatan rotan dikekalkan (lihat perenggan 25).]

Notes

For cases on appeals against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.

For cases on appeals against sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 558–574.

For cases on s 39B(1)(a) of Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 290–445.

Cases referred to

Aziz bin Muhamad Din v PP [1996] 5 MLJ 473 (refd)
Chai Chien Wei Kelvin v PP [1999] 1 SLR 25 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155 (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (folld)

Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Lau Song Seng & Ors v PP [1998] 1 SLR 663 (refd)
Lee Weng Sang v PP [1978] 1 MLJ 168 (refd)
Loo Kia Meng v PP [2000] 3 MLJ 664 (refd)
Muhammed bin Hassan v Public Prosecutor [1998] 2 MLJ 273 (refd)
PP v Hoo Chee Keong [1997] 4 MLJ 451 (refd)
PP v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
PP v Lee Weng (Raub Criminal Trial No 3 of 1949) (refd)
PP v Mohd Fuzi bin Wan Teh & Anor [1989] 2 CLJ 652 (refd)
PP v Tay Bee Seng [1992] MLJU 10 (not folld)
Poon Heong v PP [1949] MLJ 114 (refd)
R v Brophy [1981] 2 All ER 705 (refd)
R v Fitton (156) 116 CCC 1 (refd)
R v Precourt (1976) 39 CCC (2d) 311 (refd)
RCA Corp v Customs Cleared Sales Pty Ltd [1978] 19 ALR 123 (refd)
Seow Choon Meng v PP [1994] 2 SLR 853 (refd)
Sim Ah Cheoh & Ors v PP [1991] 2 MLJ 353 (refd)
Syed Yasser Arafat bin Shaik Mohamed v PP [2000] 4 SLR 27 (refd)
Wong Kam-ming v R [1979] 1 All ER 939 (refd)

Legislation referred to

Criminal Procedure Code s 112(ii)
Dangerous Drugs Act 1952 ss 12(2), 37(d), 37(j), 37A(1), 37A(2), 39A(2)(d), 39B(1)(a), 39B(2)

Appeal from: Criminal Trial No 45–36 of 1999 (High Court, Pulau Pinang)

Meor Hashimi bin Abdul Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Khoo Chye Beng (R Thinukaran with him) (Athimulan & Co) for the respondent.

Augustine Paul FCJ (delivering judgment of the court):

[1] In this case, the accused was charged with the offence of trafficking in 149.60g of heroin and 35.77g of monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act in the High Court in Pulau Pinang. At the conclusion of the case for the prosecution, the learned High Court judge amended the charge to one of possession under s 12(2) of the Act and punishable under s 39A(2)(d) of the Act. The accused pleaded guilty to the amended charge. Upon his conviction a sentence of nine years' imprisonment was imposed with effect from the date of his arrest. He was also ordered to be given 10 strokes of the rattan. This appeal is by the prosecution against the conviction and sentence.

[2] Briefly stated, the facts of the case are that on 5 March 1999, Abdul Rahim bin Shariff (PW9) led a police party to conduct a raid at premises No 5, Lebuh Melaka, Georgetown, Pulau Pinang. As the grill door to the premises was locked and was not

opened despite requests to do so it was forced open. There was nobody in the ground floor nor was anything incriminating found. PW9 then went upstairs with two others. There were two rooms in that floor. Nothing was found in the first room. When they broke open the door of the second room they found that it was not lighted. When they switched on the lights they found that the accused had just woken up from sleep. He looked frightened. There was nobody else in the room. Nothing incriminating was found on the body of the accused. PW9 then conducted a search of the room. He found the following:

(a) three plastic packets suspected to contain heroin were in a Sanyo Cordless Phone box which was on a steel cabinet;

(b) six plastic packets suspected to contain heroin were in a 'kotak tabung' which was on the upper part of the clothes rack;

(c) ten plastic packets suspected to contain heroin were in an envelope which was in a Chinese tea tin container in the same rack; and

(d) three plastic packets suspected to contain heroin were on the dressing table.

[3] Some personal belongings of the accused were also recovered from the room. The room had been rented by him. The exhibits seized were sent to the chemist for analysis who confirmed that they contained dangerous drugs as stated in the charge. The accused also made a cautioned statement under s 37A of the Act. This was ruled as inadmissible by the learned trial judge. Upon the charge being amended to one of possession the accused pleaded guilty and he was sentenced accordingly.

[4] The submissions advanced by both the parties before us warranted consideration of the following issues:

(a) the admissibility of the cautioned statement;

(b) the sufficiency of the evidence of the chemist;

(c) the reduction of the charge by the learned trial judge; and

(d) the adequacy of the sentence imposed.

[5] The four issues will now be considered.

A. THE ADMISSIBILITY OF THE CAUTIONED STATEMENT

[6] In ruling that the cautioned was inadmissible, the learned trial judge said in his grounds of judgment:

> I shall now decide whether ID37 was made voluntarily or not.
>
> Section 37(A)(2) of the Dangerous Drug Act 1952 ('the DDA') reads as follows:
>
> > (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

The recording officer (TSP1) has stated that after he read the caution under s 37(A)(1)(b) of the DDA he did not inform the accused that he need not answer any questions as provided under s 37(A)(2) of the DDA.

In the case of *Public Prosecutor v Tay Bee Seng* [1992] 1 MLJU 10, his Lordship Abdul Malik Ishak JC (as he then was) said:

> Inspector Syed Talib stated that he could not remember reading the provisions of s 37A(2) of the Dangerous Drugs Act 1952 to the accused. Now sub-s (2) of s 37A of the Dangerous Drugs Act 1952 reads thus:
>
> > (2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.
>
> The court cannot speculate what would be the reaction of the accused had sub-s (2) of s 37A been read to him, as this was not done. However, there was evidence during the trial within the trial that the accused did not volunteer to give the cautioned statement. This piece of evidence came from ASP Ahmad bin Megat Hussain (BDB SP1) who had earlier directed one Inspector Syed Talib to record the cautioned statement of the accused. It would therefore not be unreasonable for the court to deduce favourably for the accused that he would not give the statement had the provisions of subsection (2) of s 37A been read to him.

In our case, it would be reasonable for the court to deduce favourably for the accused that he would not give the statement had the provisions of s 37A(2) of the DDA read to him.

In ID37 in lines 32 to 33 of p 2, the accused has stated 'Polis telah jumpa sepuluh lebih hingga dua puluh peket 'pekhun' di dalam bilik saya'.

And in lines 35 to 43, the recording officer asked the accused the following questions:

> S: Apakah yang kamu maksudkan dengan 'Pekhun' yang kamu sebutkan di atas?
>
> J: 'Pekhun' adalah dadah.
>
> S: Dadah yang kamu sebutkan di atas itu siapa yang punya?
>
> J: Saya yang punya.
>
> S: Untuk tujuan apakah kamu simpan dadah itu dalam bilik kamu?
>
> J: Untuk hisap sendiri dan saya juga ada jual sedikit kepada orang lain.
>
> S: Rumah di mana kamu ditangkap adalah kepunyaan siapa?
>
> J: Rumah ini kepunyaan Lau Soh Kee dan saya sewa bilik daripadanya dengan bayaran RM200.00 sebulan.

And at p 3 lines 2 to 4, the recording officer asked the following question:

> S: Adakah kamu berkongsi bilik dengan orang lain?
>
> J: Tidak.

ID37 contains six questions asked by the recording officer. No doubt the recording officer can ask questions but his questions should not be leading, suggestive and probing questions.

The recording officer has admitted that the 6 questions that were asked by him disclose the nature of the drugs, the identity of the person, the drugs belongs to whom, the purpose of the drug been kept in the room and the ownership of the house and the value of the drugs and finally whether the room where the offending exhibits found whether (sic) shared by

A any others. Whereas the narrative answers given by the accused does not show all the elements mentioned above except the word of 'Pekhun'.

The recording officer has carried out cross-examination to enquire as to elements of the crime by probing questions. On this ground alone this shows that the statement is not made voluntarily. In the case of *PP v Tay Bee Seng*, his Lordship Abdul Malik Ishak JC (as he then B was) said:

> Again in the purported cautioned statement (ID14) there were 13 questions posed by Inspector Syed Talib to the accused. These 13 questions were in the nature of cross-examination.*Stone's Justices' Manual* (79th Ed) p 292 stated in no uncertain terms the following:
>
> C
>
> > A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what D individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

The recording officer in cross-examination has stated that he did not tell the accused that if the accused admit to the finding of the offending drugs and if the accused is found guilty he will be sentenced to death. So I am of the view that the recording officer has not E explained the consequences of giving statement.

In the case of *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652, his Lordship Shaik Daud J (as he then was) at p 654 said:

> On the first issue that is that the caution was not explained to the accused I tend to F agree. PW8 in his evidence said that he 'read' the caution as in s 37A of the Dangerous Drugs Act 1952 and no-where did he say that he explained it as well. A man may be literate enough to be able to read but to understand and know what the consequences of what was being read to him is entirely another thing, more so when we are dealing with language of the law. It is my view that administering of the caution should not be merely a mechanical exercise of just reading it to the accused person. PW8 should have G not merely read the caution but also explained it and its consequences to the accused. This he did not.

The accused has agreed to the suggestion during cross-examination that at the time of recording of the statement he was not in a proper state of mind.

H In view of the aforesaid I find that ID37 was not made voluntarily. So I hold that ID37 is not admissible in evidence.

[7] The learned trial judge had ruled the cautioned statement to be inadmissible on the ground that:

I (i) there was no compliance with s 37A(2) of the Act;

(ii) the questions asked by the recording officer amounted to cross-examination of a probing nature; and

(iii) the failure to explain the consequences of making the statement to the accused.

[8] We shall now consider the three grounds.

(i) There was no compliance with s 37A(2) of the Act

[9] Section 37A(2) of the Act reads as follows:

> Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to such case after any such caution as aforesaid has been administered to him.

[10] The significance of this provision of law as explained in *Public Prosecutor v Tay Bee Seng* [1992] MLJU 10 is not a clear, complete and accurate reflection of its scope. What it means is that a person to whom a caution has been administered is not bound to answer any question even though some other written law may require him to do so. The 'written law' referred to in s 37(2) of the Act is a reference to s 112(ii) of the Criminal Procedure Code which imposes a legal duty on a person to answer all questions except those that have a tendency to incriminate him. Thus the purpose of 37(A)(2) of the Act is to nullify the effect of s 112(ii) of the Criminal Procedure Code. This view is supported by the unreported case of *Public Prosecutor v Lee Weng* (Raub Criminal Trial No 3 of 1949) cited with approval by Willan CJ in *Poon Heong v Public Prosecutor* [1949] MLJ 114 in commenting on para 2 of reg 33 which is similarly worded as 37(A)(2) of the Act. As his Lordship said at p 115:

> … if questions are to be allowed, the provisions of para (2) of the regulation have to be emphasised because otherwise an accused person familiar with the normal law under s 112 of the Criminal Procedure Code, but unfamiliar with the regulations might think that he was legally bound to answer the questions and to answer them truly. Section 112 has existed for so long that such a state of mind could not, I think, be considered unreasonable.

[11] It will be observed that 37(A)(2) of the Act reiterates what is contained in the caution. Thus a proper explanation of the caution with emphasis on the right of a person not to answer any questions as contained therein will ensure that 37(A)(2) of the Act has been complied with. Such an explanation will ensure that the person is clear in his mind that there is no obligation on him to answer questions so as to affect the voluntariness of the statement. It is therefore unnecessary to read 37(A)(2) of the Act to a person giving a statement. To that extent, the learned trial judge has been misguided by the authority relied on by him.

(ii) The questions asked by the recording officer amounted to cross-examination of a probing nature

[12] Section 37A(1) of the Act expressly authorises the asking of questions in eliciting a statement from a person. As a matter of fact properly conducted police questioning is a legitimate and effective aid to criminal investigation (see *R v Precourt* (1976) 39 CCC (2d) 311). However, in certain circumstances the method of questioning may render the statement made inadmissible. If the questions are in the nature of cross-examination they are not unlawful per se (see *Datuk Haji Harun bin*

A *Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; *Lee Weng Sang v Public Prosecutor* [1978] 1 MLJ 168). In *Syed Yasser Arafat bin Shaik Mohamed v Public Prosecutor* [2000] 4 SLR 27, it was held that the interrogation preceding a confession may be robust and the mere use of the question and answer method of cross-examination in recording a confession would not render the statement involuntary. However, in *Lau Song Seng & Ors v Public Prosecutor* [1998] 1 SLR 663, the Singapore Court of Appeal in following*Sim Ah Cheoh & Ors v Public Prosecutor* [1991] 2 MLJ 353 and *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR 853 held that a cross-examination style of interrogation does not render the statement given involuntary unless the questioning was so vigorous or prolonged that it could be said to be oppressive. Thus as observed by the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, the admissibility of a statement is not affected by the nature of the questions asked if it is otherwise voluntary. In this regard, reference may be made to *R v Fitton* (156) 116 CCC 1 where Rand J said:

> The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreaux v The King* 94 Can CC 1, (1949) 3 DLR 81, SCR 262, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, *the effect of questions* or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.
>
> … … …
>
> Questions without intimidating or suggestive overtones are inescapable from police inquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority? (Emphasis added)

[13] The test, therefore, in determining whether the questions asked are offensive is to ascertain whether they have affected the voluntary nature of the statement. The starting point for such an exercise is the manner of establishing the voluntariness of a statement. It is settled law that a finding on the voluntariness of a statement is part objective and part subjective (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232). As Yong Pung How CJ said in *Chai Chien Wei Kelvin v Public Prosecutor* [1999] 1 SLR 25 at p 52:

> The objective limb is satisfied if there is a threat, inducement or promise, and the subjective limb when the threat, inducement or promise operates on the mind of the particular accused through hope of escape or fear of punishment connected with the charge: *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 and *Mohd Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350.

[14] Thus, the accused has an evidential burden to elicit facts which bear on his subjective vulnerability in order to render the confession involuntary (see *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199). The corollary is that an accused person who is seeking to

challenge the admissibility of a confession on the ground of involuntariness may for all practical purposes be obliged to testify in the trial within a trial if his challenge is to have any chance of succeeding (see *Aziz bin Muhamad Din v Public Prosecutor* [1996] 5 MLJ 473; *Wong Kam-ming v R* [1979] 1 All ER 939; *R v Brophy* [1981] 2 All ER 705). It is only his evidence which will establish the subjective aspect of the involuntariness of the statement. As a statement obtained pursuant to a cross-examination mode of questioning during its recording will become inadmissible only if its voluntariness has thereby been affected it follows that the accused must testify on the manner in which the questions operated in his mind so as to cause him to make the statement. His evidence may, for example, reveal that the questions were of such a nature that they amounted to an intimidating and threatening form or oppression to compel him to answer them thereby making the statement inadmissible. In the absence of such evidence it will not be possible to make a ruling on the effect of the questions in order to satisfy the subjective element of voluntariness. Thus it is absolutely necessary for an accused to lead evidence on the effect of questions in the nature of cross-examination on him in order to determine the voluntariness of the resultant statement.

[15] The accused did not give any evidence on the effect the questions asked had on him in order to cause him to answer them. Without such evidence, the learned trial judge proceeded to rule that the cross-examination of the accused by the recording officer amounted to probing questions being asked thereby rendering the statement involuntary. This, as explained earlier, is only the first part of the test that is involved in an objection of this nature. Clearly, the learned trial judge was in error in making the ruling without any consideration of the subjective aspect of the questioning. He had misdirected himself in following *Public Prosecutor v Tay Bee Seng* which had not fully explored the law in this area.

(iii) The failure to explain the consequences of making the statement to the accused

[16] In *Public Prosecutor v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652, it was held that the consequences of the caution must be explained to the accused. The learned trial judge took this to mean, on the facts of this case, that it must be explained to the accused that if he is found guilty he would be sentenced to death. There is no requirement in law for the caution to be explained as contemplated by the learned trial judge. At the time of recording, the statement the police authorities may not even have decided on the provision of law under which the accused is to be charged, if at all. Therefore, it is not possible to explain the caution to the accused in the terms as propounded by the learned trial judge. What the accused must be made aware of is that he is not obliged to say anything or to answer any question and that anything he says may be used as evidence. The unnecessary extension of the requirements of the caution by the learned trial judge is an error of law.

[17] It follows that the grounds upon which the learned trial judge ruled the cautioned statement as being inadmissible cannot be sustained in law. However, the ruling made can be justified on another ground. A perusal of the notes of evidence reveals that there is no evidence of the actual words of the caution read to the

accused. The need for such evidence was stressed recently by the Federal Court in *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 at pp 398–398:

> The logical corollary is that evidence that the caution under s 113 was merely read will deprive the court of the opportunity to exercise its discretion in order to determine whether the caution that was administered is as prescribed or to the like effect. It will amount to the court accepting the conclusion of the witness that the prescribed caution had been administered when the conclusion is one that must be arrived at by the court itself based on evidence that has been adduced. The court can be 'satisfied' that the caution was administered as required only with adequate proof of the words used. This can only be done if there has been evidence of the actual words used by the recording officer. In that event the court would be in a position to determine whether the caution that was administered is as prescribed or to the like effect or is something that is different. Oral evidence of the words used is particularly significant in this case as it is subject to appellate review. There is no such oral evidence though the words used appear in the cautioned statement. The resultant matter for consideration is whether the cautioned statement can be used as evidence of the words of the caution that was administered. The relevant part of the cautioned statement reads as follows:
>
> > Sebelum saya merakamkan percakapan tertuduh ini, terlebih dahulu saya memberi amaran kepada beliau mengikut s 113 KAJ seperti berikut 'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan tetapi apa-apa jua yang kamu nyatakan sama ada sebagai menjawab sesuatu soalan atau tidak, boleh diberi sebagai keterangan'.
>
> The contents of a cautioned statement are substantive evidence of whatever the accused had said. As the passage just reproduced is a statement of the recording officer it is not substantive evidence. It can only be used to corroborate his evidence under s 157 of the Evidence Act 1950. Corroborative evidence is only admissible to support testimony that has already been given. It is not admissible to supplement such testimony. In *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144, this court adopted *Director or Public Prosecution v Hester* [1973] AC 296 where it was held that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible. It was further held that if the evidence to be corroborated is found to be uninspiring and unacceptable then corroboration would be futile and unnecessary. It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. In any event he did not say that the caution that he read is as recorded in the cautioned statement.
>
> The result is that there is no evidence before the court in order to be 'satisfied' whether the caution that was administered is as prescribed or contain words to the like effect.

[18] The cautioned statement made by the accused is therefore inadmissible as there is no evidence of the actual words of the caution that was administered.

B. THE SUFFICIENCY OF THE EVIDENCE OF THE CHEMIST

[19] The material part of the evidence of the chemist pertinent to the issue now under consideration reads as follows:

> S: Bolehkah puan memberikan jumlah sampel yang diambil untuk dianalisis bagi tiap-tiap barang kes tersebut secara terperinci?

J: Jumlah sampel bagi peket plastik A1 hingga A7 ialah 4.3731g. Berat sampel bagi peket plastik yang bertanda E2–7 ialah 2.7429g. Jumlah berat sampel bagi peket-peket plastik yang bertanda E2–2 hingga E2–6 ialah 1.3594g. Jumlah sampel bagi peket-peket plastik yang bertanda BB1 hingga BB10 ialah 8.7864g. Berat sampel bagi peket-peket plastik bertanda E4–3, ialah 0.2633g. Jumlah berat sampel bagi peket-peket plastik yang bertanda E4–1 dan E4–2 ialah 0.1882g. Kesemua berat sampel-sampel tadi adalah mencukupi untuk tujuan analisis.

S: Adakah berat sampel-sampel tersebut telah mencapai 10% daripada keseluruhan berat peratusan heroin dan monoacetylmorphines tadi?

J: Jumlah berat sampel-sampel tersebut tidak mencapai 10% daripada berat heroin atau monoacetylmorphines kerana dalam analisis secara scientific tidak ada autoriti yang mewajibkan pengambilan sampel sebanyak 10%. Saya tidak perlu mengambil sampel sebanyak 10% kerana sampel yang melebihi 10% berat memberikan keputusan yang sama dengan keputusan yang diberikan oleh sampel yang kurang 10% berat. Peratusan sampel tidak memberikan keputusan yang berbeza. Saya telah mengambil sampel yang mencukupi untuk tujuan analisis berdasarkan standard operation procedure yang dikeluarkan oleh Jabatan Kimia Malaysia. Standard Operation Procedure ini adalah berdasarkan United Nations Manual dan diikuti oleh semua cawangan Jabatan Kimia Malaysia. … … …

S: Semalam puan ada memberi keterangan bahawa puan ada mengambil sampel … bagi tujuan ujian dan analisa terhadap kesemua barang-barang kes ini. Soalan saya bagaimanakah cara puan mengambil sampel bagi setiap barang kes tersebut?

J: Di dalam kes ini kesemua bahan tersebut saya kisar dengan menggunakan Kitchen Blender. Saya mengisar selama 10 minit. Di dalam masa 10 minit itu saya menggoncang-goncangkan bahan yang dikisar di dalam peket plastik kemudian saya masukkan semula ke dalam Kitchen Blender dan saya kisar sekali lagi. Tujuan saya ialah agar semua bahan tersebut homogenize. Selepas itu saya mengambil sedikit sampel untuk tujuan analisis.

S: Bagaimana pula dengan keadaan Kitchen Blender yang dimaksudkan sama ada ia berfungsi dengan baik atau tidak?

J: Kitchen Blender yang saya gunakan masih berfungsi dengan baik.

S: Bagaimana puan dapat pastikan bahawa kesemua sampel tersebut telah dihomogeniskan?

J: Kaedah sampling ini telah diuji oleh Unit Pembangunan dan Jaminan Kualiti di Jabatan Kimia Petaling Jaya.

Mengikut data yang mereka perolehi dari ujian tersebut mereka dapati peratusan coefficient of variation menjadi leveled of setelah lima minit pengisaran. Ini adalah berdasarkan graf masa melawan peratus coefficient of variation. Setelah unit pembangunan dan jaminan kualiti mengesahkan perkara ini maka kaedah pengisaran untuk menghomogeniskan bahan ketulan dan serbuk dilakukan di semua cawangan Jabatan Kimia.

Keputusan yang saya perolehi daripada data gas chromatography adalah reproducible di mana coefficient of variation yang saya perolehi adalah kurang 5%. Dalam instituision coefficient of variation yang digunakan adalah 5%. Berdasarkan sebab-sebab tadi saya pasti bahawa sampel yang saya ambil telah mencukupi kerana kesemua bahan tersebut telah homogenize dan mempunyai peratus heroin dan monoacetylmorphines yang sama tidak kira berapa berat sampel yang saya ambil.

S: Adakah sampel tersebut mencukupi kesemua barang-barang kes ini?

J: Kesemua sampel tersebut adalah mewakili kesemua barang kes tersebut.

[20] In dealing with the evidence of the chemist, the learned trial judge said in his grounds of judgment:

The next issue is whether the prosecution has made out a prime facie case.

Section 37(j) of the DDA reads as follows:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

In the case of *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664, his Lordship Shaik Daud JCA (in delivering the judgment of the Court of Appeal) at p 668 said:

> He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s 2 of the Act. Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% from the receptacle in which the drug was found. The chemist merely said he took 20 random samples but nowhere has he said in his evidence that this 20 random samples represented at least 10% of the dried plant material. For all we know the 20 random samples may be more, or for that matter, may be less than 10%. It is incumbent upon the chemist to take a minimum of 10% by virtue of s 37(j) of the Act. We find that when he said he took 20 random samples, it is ambiguous as the 20 samples could be more or less than 10%. The learned DPP submitted that the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 samples could well be much less than the 10% required to be taken. We hold that pursuant to s 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.

Elliza bte Mat Nor (SP2), the chemist has in her examination-in-chief stated that the weight of the samples did not reach 10% of the weight of the heroin or monoacetylmorphines because in the scientific analysis there is no authority that 10% of the sample must be taken.

In cross-examination, SP2 agreed that in the analysis of the drugs she did not use the provision of s 37(j) of the DDA.

In view of the aforesaid, I find that so far as the charge of trafficking is concerned, the case against the accused was not proved beyond reasonable doubt. (See the case of *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664.)

I accordingly amended the charge to one of possession of 185.3g of dangerous drugs (149.60g heroin and 35.77g monoacetylmorphines) under Section 12(2) read with s 39A(2)(d) of the DDA and called upon the accused to enter his defence.

[21] In *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664, it was held that under s 37(j) of the Act a minimum of 10% of the contents of the receptacles must be

analysed. As this was not done the charge of trafficking was reduced to one of possession. The learned trial judge followed this course of action as the chemist in this case also did not analyse 10% of the total contents of the receptacles. The samples that she took from the contents of the receptacles after having homogenized them was less than 10%. In *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, Abdul Hamid Mohamad JCA (as he then was) in an illuminating judgment declined to follow *Loo Kia Meng* and held that the percentage referred to in s 37(j) of the Act is a reference to the receptacles and not the total weight of the drugs found or the total weight of the samples taken. Where representative samples are taken from each receptacle it is for the chemist to determine the sufficiency of the required weight. That was the procedure followed in this case and is the correct course of action adopted as explained in *Gunalan a/l Ramachandran*. The samples analysed by the chemist are therefore sufficient in law to support her conclusion. Even if *Loo Kia Meng* can, for a moment, be assumed to have been correctly decided the resultant reduction of the charge to one of possession is not in accordance with law. If the drugs analysed are insufficient to sustain a charge for trafficking it cannot, by the same process of reasoning, be sufficient to sustain a charge for possession as well. This is for the obvious reason that s 37(j) of the Act is of general application and not confined to only charges of trafficking. Thus the reliance of the learned trial judge on *Loo Kia Meng* to reduce the charge is an error of law.

[22] We interpolate to add that it would appear that the learned trial judge referred only to the weight of the drugs to determine whether there was a prima facie case for trafficking. He ought to have analysed the whole of the evidence in order to make such a finding. His failure to do so compelled us to undertake the exercise.

C. THE REDUCTION OF THE CHARGE BY THE LEARNED TRIAL JUDGE

[23] The facts of the case reveal that the dangerous drugs were recovered from a room which was occupied by the accused. At the time of the police raid, he looked frightened. On the facts of this case, there can be little dispute that the accused had custody of the receptacles containing the dangerous drugs. What requires deliberation is whether he had knowledge of the contents in order to establish that he had possession of the dangerous drugs. As Thomson J (as he then was) said in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove mens rea. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v Rex* [1949] MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.
>
> If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee Boon Gan v R* [1954] MLJ 103, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was', or again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[24] It is therefore clear that proof of knowledge is very often a matter of inference (see *Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451). It must be observed that the court is not concerned with the knowledge of a reasonable man but is concerned with a reasonable inference to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue (see *RCA Corp v Customs Cleared Sales Pty Ltd* [1978] 19 ALR 123). In this case, apart from proof of custody of the dangerous drugs, there is no evidence on record to infer knowledge of them by the accused. The fact that the accused looked frightened is neutral on the facts of this case. It therefore becomes necessary to invoke the statutory presumption in s 37(d) of the Act to infer the required knowledge on the part of the accused in order to establish that he had possession of the dangerous drugs. It is therefore not possible to further presume that the accused was trafficking in the dangerous drugs as provided in the Act on the principle enunciated in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. It follows that the reduction of the charge by the learned High Court judge is still sustainable.

D. THE ADEQUACY OF THE SENTENCE IMPOSED

[25] It is well established that sentencing in drug offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case, the amount of dangerous drugs involved is very substantial. In such circumstances, neither the guilty plea of the accused nor the fact that he is a first offender can be considered too favourably in favour of the accused. Thus, we were of the view that the sentence imposed by the learned trial judge was inadequate. Accordingly, we increased the term of imprisonment to 15 years. The imposition of the 10 strokes of the rattan was retained.

[26] In the final analysis, we dismissed the appeal against conviction and allowed the appeal against sentence in part.

Appeal against conviction dismissed. Appeal against sentence in part allowed.

Reported by Peter Ling